SUPREME COURT, U. S.

FILED
NOV 21 1968
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 62

THOMAS R. KAISER,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

PETER L. F. SABBATINO
233 Broadway
New York, New York 10007
Attorney for Petitioner

HENRY J. BOITEL
Of Counsel

INDEX

	Page
Introductory Comment	1
1. The Standing of the Petitioner to Raise Certain Constitutional Issues in This Court	3
2. The Effect of *Fuller* v. *Alaska*, No. 249, This Term, Upon the Issues Presented in This Case	17
(a) The Petitioner Herein Stands in a Precisely Co-Equal Position With the Petitioner in Lee	8
(b) The Fuller Rationale Was in Part Based Upon the "Good Faith Reliance" of Law Enforcement Officials, But Such Good Faith Reliance Is Demonstrably Absent in the Present Case	9
(c) Fuller Is Distinguishable From the Present Case	10
(d) Even If Section 605 by Itself Does Not Require the Reversal of the Petitioner's Conviction, the Statute Does Not Thereby Completely Lose Its Vitality in This Regard, But Rather Provides Added Strength to the Petitioner's Constitutional Arguments—Arguments Not Present in the Fuller Case	11
(e) The Petitioner's Case Is One of First Impression in This Court	14
3. The Respondent's Absurd Factual View Concerning the Function and Status of Telephonic Communications	15
4. There Is No Merit in Fact or in Law to Respondent's Argument That *Katz* v. *United States*, 389 U. S. 347, Should Be Limited to	

Page

Its Facts and That Fourth Amendment Protections Should Be Circumscribed by a "Contact" Theory 20

5. The Respondent Is Incorrect in Arguing That the Actual Wiretap Procedures Followed Complied With Fourth Amendment Standards 24

(a) The Petitioner Did Not Knowingly Expose His Conversation to Public Hearing 24

(b) The Criteria of the Fourth Amendment Should Not Be Relaxed for the Purpose of Accommodating Wiretapping 25

(c) The Lack of Probable Cause 26

(d) The Lack of Judicial Supervision 28

i. Particularity 28

ii. Duration of Search 29

iii. Return 30

iv. Notice 31

(e) The Quantity of Wiretap Warrants Involved 32

6. The Retroactivity Problem 33

7. The Effect of the Recent Change in Federal and New York State Wiretap Laws 36

8. The Applicability of the Ninth Amendment 37

9. The Respondent's Arguments Concerning "Extreme Judicial Activism" and "Constitutional Crisis" 38

Conclusion 42

Page

Table of Authorities Cited

CASES:

Benanti v. *United States*, 355 U.S. 96 (1957) 9, 13
Berger v. *New York*, 388 U.S. 41 (1967) 5, 6, 7, 12, 36

Camara v. *Municipal Court*, 387 U.S. 523 (1967) 25

Desist v. *United States*, No. 12, This Term 11
Destefano v. *Woods*, —— U.S. ——, 88 S.Ct. 2093 (1968) 35

Fuller v. *Alaska*, —— U.S. ——, No. 249, This Term (1968) 7, 8, 9, 10, 11, 12, 13, 33, 36

Goldman v. *United States*, 316 U.S. 129 (1942) .. 21
Gouled v. *United States*, 255 U.S. 298 (1921) 32

Johnson v. *New Jersey*, 384 U.S. 719 (1966) 34, 35

Katz v. *United States*, 389 U.S. 347 (1967) ..6, 12, 20, 21, 22, 29, 30, 31, 32

Lee v. *Florida*, 392 U.S. 378 (1968) ..7, 8, 9, 11, 12, 13, 25
Linkletter v. *Walker*, 381 U.S. 619 (1965) 12, 13, 34

Manhattan Life Ins. Co. v. *Cohen*, 234 U.S. 123 (1914) 4
Mapp v. *Ohio*, 367 U.S. 643 (1961) 12, 34
Marron v. *United States*, 275 U.S. 192 (1927) 6
Miranda v. *Arizona*, 384 U.S. 436 (1966) 2

Nardone v. *United States*, 302 U.S. 379 (1937) .. 13

Olmstead v. *United States*, 277 U.S. 438 (1928) .. 13, 21
Osborn v. *United States*, 385 U.S. 323 (1966) 28, 31

People v. *McCall*, 17 N. Y. 2d 152 (1966) 29

Raley v. *Ohio*, 360 U.S. 423 (1959) 4
Rochin v. *California*, 347 U.S. 165 (1952) 41

Schmerber v. *California*, 384 U.S. 757 (1966) 32
Stovall v. *Denno*, 388 U.S. 293 (1967) 15, 34, 35

Tehan v. *Shott*, 382 U.S. 406 (1966) 34

Page

Warden v. *Hayden*, 387 U.S. 294 (1967) 32
Weiss v. *United States*, 308 U.S. 321 (1939) 16
Whitney v. *California*, 274 U.S. 357 (1926) 4

UNITED STATES CONSTITUTION:

Article One, Section Eight 14
First Amendment 2, 14, 33
Fourth Amendment 5, 6, 11, 13, 14, 20, 21, 22, 23, 24, 25, 26, 33
Fifth Amendment 2, 14, 32, 33, 34
Sixth Amendment 35
Ninth Amendment 14, 33, 37, 38
Fourteenth Amendment 2, 11, 14, 33

UNITED STATES STATUTES:

Omnibus Crime Control and Safe Streets Act of 1968 13
47 U.S.C. 605 (1934) c. 652, Title VI, §605, 48 Stat. 1103 ..... 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 33, 36

NEW YORK STATE STATUTE:

New York Code of Criminal Procedure, §813-a, *as amended*, L. 1958, c. 676 ..... 5, 9, 36

OTHER AUTHORITIES

Black, H.L., *A Constitutional Faith* (1968) 42
Gregory, F.M., in 44 *Notre Dame Lawyer* 171 (1968) 42
Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, 87th Congress, First Session, on Bills Relating to Wire-tapping and Eavesdropping 10
Joint Supplemental Reply Brief For Petitioners, *Desist* v. *United States*, No. 12, This Term 10-11
Petition For a Writ of Certiorari, *Fuller* v. *Alaska*, No. 249, This Term 12
Stern & Gressman, *Supreme Court Practice*, 3rd Ed., (1962) 4

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 62

THOMAS R. KAISER,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

Introductory Comment

Counsel for the Petitioner regrets the necessity for the submission of a lengthy reply brief. In view of the extensive many-faceted Brief for the Petitioner, the short time allowed for oral argument and the importance of the issues under consideration we are constrained to follow this course.

This introduction will comment briefly upon certain questions not discussed below.

The Respondent's treatment of the facts as to the Petitioner is argumentative and includes mistaken assertions. Since we do not understand the facts which were developed after the installation of the wiretaps to be of decisional importance, we shall not undertake to reply.

Arguments concerning the First, Fifth and Fourteenth Amendments are not developed independently herein. As to the First Amendment, see the Introduction to the Argument in our opening brief, pp. 43-48, and Item 3, *infra,* p. 15. The Fifth Amendment is treated under our argument concerning the lack of notice, pp. 31-32 *infra.* It is of some note that the Respondent finds no Fifth Amendment value involved in wiretapping (Resp. 132-134), but elsewhere urges that for all practical purposes, it was appropriate for the petitioner's wiretapped conversations to be characterized as "confessions" (Resp. 142-146). We believe our arguments generally establish that the wiretapping herein constituted a violation of Fourteenth Amendment Due Process, and so, no separate argument will be made in that regard.

The characterization of the wiretap conversations as being confessions is not met squarely by the Respondent. By summary, he minimizes the language used and the extent of its use. He does not deal with the problem posed by the decision of *Miranda* v. *Arizona* during the course of the trial, nor with the analogy to defendants who have in fact confessed. He persists in characterizing the conversations as being "a confession in practical fact." (Resp. 142). If that is what he thinks, one may easily conclude what the jurors thought upon being presented with that characterization.

We advise the Court that Items 3 and 9, *infra,* involve extensive quotation from Respondent's Brief. Although

such practice is usually discouraged, we have brought the material together under one heading to demonstrate the factual and philosophical approach which the Respondent would have this Court assume.

Applicability of prior decided pivotal decisions upon the issues presented in this case, is discussed under two headings. Item 2 deals with the so-called retroactivity doctrine as it applies to violations of Section 605, and Item 6 deals with that doctrine as it applies to Constitutional questions.

1.

The Standing of the Petitioner to Raise Certain Constitutional Issues in This Court.

The Respondent in his Brief on the Merits urges that the Petitioner is without standing to argue that the warrant herein was not issued upon a showing of probable cause (Resp.[1] 65).

As is conceded by the Respondent, the New York Court of Appeals passed upon the issue of probable cause and declared that probable cause had been shown (Resp. 65). In fact, the opinion of the Court of Appeals dealt with the issue at length (A. 311-312; 21 N.Y. 2d 90, 89-91, 95-96; 286 N.Y.S. 2d 801, 803-803, 808-809).

The Respondent's claim is easily annswered without analysis of the Petitioner's Briefs in the Court of Appeals:

[1] In this Reply Brief, the following abbreviations are used to denote references to documents which are before this Court: "A." denotes the Petitioner's Appendix; "Resp." denotes the Respondent's Brief on the Merits; "Pet." denotes the Petitioner's Brief on the Merits; and "R." denotes the typewritten transcript of the trial.

"Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears. *Whitney* v. *California*, 274 U. S. 357, 360-1; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 134. 'There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.' *Raley* v. *Ohio*, 360 U. S. 423, 436. Any inquiry into how or when the question was raised in the state courts is then considered irrelevant to the exercise of the Court's jurisdiction. An irrebuttable presumption is created that the federal question was timely and properly raised." Stern & Gressman, *Supreme Court Practice*, 3rd Ed., (1962), p. 101.

The Respondent's argument that the Petitioner is without standing to urge that no return was made upon the warrant is likewise without merit. The opinion of the Court of Appeals expressly stated: *"It is true . . . that there was no return on the warrant*—although we presume, since the defendant did not argue otherwise, that a return was made." (A. 313; 21 N.Y.2d 86, 96; 286 N.Y.S. 2d 801, 809) (emphasis added). We submit that this presumption by the Court of Appeals was unwarranted and should not operate to deprive the Petitioner of full review.

It is in this Court, for the first time, that the Respondent claims that a return was in fact made. He claims that it was made to the defense counsel and to the Trial Judge —some two years after the seizures. We discuss this claim *infra*, at pages 5-6.

One must understand the posture of this case when it reached the New York Court of Appeals. This Court had just decided *Berger* v. *New York*, 388 U.S. 41, which declared void on its face Section 813-a of the New York Code of Criminal Procedure, and reversed Berger's conviction on that ground. Our primary thrust, therefore, was to show that the wiretapping aspect of the void statute fell within the *Berger* rationale, and that, in any event, Section 605, independently and combined with *Berger*, required the exclusion of wiretap evidence. Although we argued that the procedures followed herein did not comply with the requirements of the Fourth Amendment, it did not appear appropriate, in light of *Berger*, to make a particular argument as to each of the Fourth Amendment requirements. None of the requirements were called for by the wiretap statute; an examination of the face of the form wiretap orders made it clear that they simply tracked the statute; and the record made it clear that the actual procedures followed certainly did no more than the statute required. We were, therefore, taken by surprise when the Respondent's answering brief in the Court of Appeals argued that the wiretapping was proper since the actual procedures complied with *Berger*. Their brief was served upon us less than 48 hours before oral argument. Upon oral argument, *we asked for and received permission from the Court of Appeals* to file a reply brief responsive to the new issues injected into the case by the Respondent. That reply brief was filed with the Court of Appeals a month before its decision. We argued therein that among the Fourth Amendment requirements lacked by the wiretap orders, they did not provide for a return to be filed specifying the time and circumstances of the removal of the wiretaps together with the tapes and/or recordings of all telephone conversations

obtained by the interceptions, nor did it provide for a return specifying the time and circumstances of the installation of the wiretaps. Realizing that the Court knew that no return was filed and that we challenged the basic Fourth Amendment compliance in the case as well as the Reply aspect of the order, the Court's hairline distinction is not understandable. We urge this Court not to follow the Court of Appeals' presumption, or, in the alternative, to hold that it is a distinction without a difference since the lack of a return requirement in the statute and in the order unconstitutionally placed the making of a return within the complete discretion of the executing officers.

The Respondent additionally argues that the Petitioner's lack of a proprietary interest in the tapped telephone deprived him of standing to challenge the extensive period of time over which the wiretap order was effective (Resp. 71) and the lack of a notice (Resp. 72) provision in the order. This argument is clearly without merit. Applying the law of the case theory, it will be found that the record reveals that the Trial Court held the defendant to have standing to challenge all three telephones from which wiretap evidence was produced at the wiretap hearing, not simply the one upon which the Petitioner spoke (A. 69-70). Directly to the point, however, it was the Petitioner's conversation which was seized, not the telephone, or the telephone wire, or the room. This was the very principle involved in *Katz* v. *United States,* 389 U.S. 347. There is, therefore, no question that he has standing to attack the warrant, and if it is found lacking in the basic requirements of the Fourth Amendment, then it is void and cannot be used to justify the search. *Marron* v. *United States,* 275 U.S. 192, *Berger* v. *New York,* 388 U.S. 41.

A similar proprietary interest argument is advanced in an attempt to prevent the Petitioner from attacking the two month extension provision of the wiretap statute (Resp. 62). As was said in *Berger, supra,* at page 55, the "petitioner clearly has standing to challenge the statute, being indisputably affected by it."

The Respondent further argues that the Petitioner may not attack the telephone taps which did not directly involve the seizure of his conversations (Resp. 79). This, too, is contrary to the holding of the Trial Court in the present case (A. 69-70). Additionally, it is clear that the telephone taps in question were part of a common scheme or plan (Resp. 78-79) and, *infra* 32-33. As to the three taps, the orders for which were revealed to the defense, examination reveals that they were signed by the same judge at the same time (A. 41-44). It cannot be seriously suggested that by using different pieces of paper to authorize the tapping of a number of telephones, a judge can escape the problem of general search implicit in such a plan.

2.

The Effect of Fuller v. Alaska, No. 249, This Term, Upon the Issues Presented in This Case.

This Court's decision of October 28, 1968, in the case of *Fuller* v. *Alaska,* No. 249, this Term, held that the exclusionary rule of *Lee* v. *Florida,* 392 U. S. 378, "is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee.*"

There can be no doubt that Section 605 of the Federal Communications Act was violated when the Petitioner's

telephone conversations were seized. There can also be no doubt that, absent the ruling in *Fuller*, the Petitioner's conviction would have to be reversed upon the authority of *Lee*. On its face, however, the *Fuller* decision would appear to deprive the Petitioner of his arguments concerning the application of Section 605 to his case. On the contrary, we submit that Section 605, *Fuller* notwithstanding, continues to require the reversal of the Petitioner's conviction. We shall argue below that (a) the Petitioner herein stands in a precisely co-equal position with the Petitioner in *Lee;* (b) the *Fuller* rationale was in part based upon the "good faith reliance" of law enforcement officials, but such good faith reliance is demonstrably absent in the present case; (c) the factual circumstances of *Fuller* are thoroughly distinguishable from the circumstances of the Petitioner's case; (d) even if Section 605 by itself does not require the reversal of the Petitioner's conviction, the statute does not thereby completely lose its vitality in this regard, but rather provides added strength to the Petitioner's Constitutional arguments—arguments not present in the *Fuller* case; and (e) the Petitioner's case is one of first impression in this Court.

(a) The Petitioner Herein Stands in a Precisely Co-Equal Position With the Petitioner in Lee.

The Petition for Certiorari in *Lee* was granted on January 15, 1968. 389 U. S. 1033. This followed the affirmance by the New York Court of Appeals in the present case (December 7, 1967). Certiorari was granted by this Court in the present case on April 22, 1968. Our Petition for Certiorari specifically presented this Court with the question of whether wiretap evidence secured in violation

of Section 605 should have been excluded from evidence in the Petitioner's case and required the reversal of his conviction. (Petition for Certiorari, pp. 4, 23-29.) Both *Lee* and the Petitioner herein were therefore properly before this Court at the same time with the same issue. In contrast, the Petitioner in *Fuller* did not enjoy that status until October 28, 1968, the date upon which his petition was granted and the judgment in his case was affirmed. No meaningful distinction can thus be drawn between the respective positions of the Petitioner herein and *Lee*, and we respectfully submit, no logical reason can be advanced for treating one differently than the other.

(b) The Fuller Rationale Was in Part Based Upon the "Good Faith Reliance" of Law Enforcement Officials, But Such Good Faith Reliance Is Demonstrably Absent in the Present Case.

We submit that the concept of good faith is completely inapplicable to wiretapping performed by New York State officials pursuant to Section 813-a of the New York Code of Criminal Procedure. This Court's opinion in *Benanti* v. *United States*, 355 U. S. 96 (1957), specifically held that wiretapping by New York State officials, pursuant to Section 813-a, was a direct criminal violation of the prohibitions contained in Section 605. Indeed, in his testimony before the United States Senate Committee on the Judiciary, on May 11, 1961, Frank S. Hogan, District Attorney of New York County, said:

> "I am not so hopeful as I should like to be that either of these bills, affecting Federal law enforcement, will pass. My lack of optimism can be attributed, in part,

to the fact that we district attorneys in New York have been patiently but eagerly waiting to hear the voice of Congress assert itself in this area since December 8, 1957.

"On that day, almost 3½ years ago, the Supreme Court of the United States, in the *Benanti* case, declared that section 605 of the Federal Communication Act, making it a crime to intercept telephone conversations and divulge their contents, applied to telephone conversations intercepted by State as well as Federal officials.

"Judges, police officials, and prosecutors in New York, it would appear, have been committing Federal crimes for over 20 years. In our defense, let it be noted that we became lawbreakers under most respectable auspices." Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, 87th Congress, First Session, on Bills Relating to Wiretapping and Eavesdropping, May 9-12, 1961, p. 430.

There can therefore be no doubt that the wiretapping herein was done under criminal circumstances, and the wiretappers were fully aware of that fact: good faith can certainly not be postulated upon such conduct.

(c) FULLER IS DISTINGUISHABLE FROM THE PRESENT CASE.

Although telegraphic and telephonic communications were both protected by Section 605, there is a substantial difference between the two means of communication, and there is likewise a difference in the treatment given to them by the statute. *Fuller* involved the seizure of a telegram. As fully developed in the Joint Supplemental Reply

Brief for the Petitioners in *Desist* v. *United States*,[2] No. 12, This Term, pp. 12-15. Section 605 *permits* the seizure of telegrams pursuant to "a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority"; on the other hand, the interception of telephonic communications by any "person not being authorized by the sender" is absolutely prohibited. The statute goes further and provides that in the event of such an illegal seizure, "no person shall divulge or publish the existence, contents, substance," etc. to any other person. *The exclusionary rule is written right into the statute, insofar as telephone communications are concerned.*

For the convenience of the Court and to the degree that the Joint Supplemental Reply Brief in *Desist, supra*, argues that the retroactive doctrine enunciated in *Fuller* should be reconsidered by this Court in a case which more accurately presents to the Court a situation of Section 605 prohibitions, we include by reference herein the argument contained in that Brief at pp. 12-28.

(d) Even If Section 605 by Itself Does Not Require the Reversal of the Petitioner's Conviction, the Statute Does Not Thereby Completely Lose Its Vitality in This Regard, But Rather Provides Added Strength to the Petitioner's Constitutional Arguments—Arguments Not Present in the Fuller Case.

This Court's decision in *Lee* v. *Florida, supra*, did not reach the issues presented under the Fourth and Fourteenth Amendments, 392 U.S. 378, ——, 88 S. Ct. 2096, 2097, footnote 2. *Fuller* manifestly was a "pure" Section 605 case,

[2] A full copy of the Brief in question has been served upon the Respondent herein together with this Reply Brief.

and did not present issues under the Federal Constitution. The sole question raised by *Fuller* in this Court was related only to Section 605 (Petition for a Writ of Certiorari, No. 249, This Term, p. 1.) The Petitioner in this case has consistently urged that Section 605 and the Federal Constitution both independently and in combination require the reversal of his conviction. Point 1-C of the Petitioner's Brief on the Merits at pp. 58-61 specifically argues that:

> "The Federal Communications Act brought telephone conversations within the realm of privacy which is protected by the Federal Fourth and Fifth Amendments, and the search for and seizure of such conversations was unreasonable in a Constitutional sense by virtue of the absolute prohibitions of the Act."

We have argued that a prospective application of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), (Pet. 52, 80), or a limited retroactive application of *Lee*, *supra*, or *Berger* v. *New York*, 388 U.S. 41, or *Katz* v. *United States*, 389 U.S. 347, in light of *Linkletter* v. *Walker*, 381 U.S. 619, require a reversal of the Petitioner's conviction. (Pet. 52-58, 63-67, 80)

We submit that the violation of fundamental constitutional rights—the right to be free from unreasonable searches and the right to be free from testimonial compulsion—are involved in telephone wiretapping (as distinguished from the Fuller telegram situation). Aside from such conversations directly falling within the protections of constitutional provisions, Section 605 brought them within the protection of those provisions. The prohibition of Section 605 being absolute, any violation of that prohibition is *per se* unreasonable. The failure of this court to give retroactive application to a pure statutory right in

Fuller, is clearly not determinative of the question as to whether the same rule will be applied concerning the constitutional violations not present in *Fuller.* Indeed, such a holding would contradict this Court's prior holding in *Linkletter* v. *Walker, supra,* (See Pet. 53-54, 80).

The vitality of the Constitutional aspect of Section 605, was therefore, as to the Petitioner, not dissipated by the *Fuller* case. In fact, this Court's holding in *Lee* would appear to leave no doubt that telephone wiretapping in violation of Section 605 was unreasonable.

It is appropriate at this point to comment upon the Respondent's claim that Section 605 may not limit the warrant provisions of the Fourth Amendment.

The Respondent's Brief at pp. 40-42 argues that:

> "It is a principle of fundamental status that neither 605 nor any other mere statutory enactment can abrogate the Fourth Amendment's permission to invade an otherwise protected area on the authority of a warrant. Such a provision cannot be withdrawn by 605, since a Constitutional provision cannot be amended by statute." (Resp., 41.)

The above argument is clearly erroneous. This Court said as early as *Olmstead* v. *United States,* 277 U. S. 438, 465 (1928), that "Congress may of course (legislate to) protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence • • •" That doctrine was reaffirmed in *Nardone* v. *United States,* 302 U. S. 379, *Benanti* v. *United States,* 355 U. S. 96, and, of course, in *Lee* v. *Florida,* 392 U. S. 378. Likewise, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Chapter 119, specifically provides at Section 2515:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Congressional legislation is not here at war with the Constitution, but rather, in protecting the integrity of the communications system, it is acting pursuant to the Commerce Power granted to it by Article I, Section 8 of the Constitution. Section 605 is not, therefore, a "mere statutory enactment"; it is the implementation of an absolute Congressional power granted by the Constitution itself. The Respondent's argument is grounded upon a fallacious understanding of Congressional power.

(e) The Petitioner's Case Is One of First Impression in This Court.

Finally, insofar as this case provides the opportunity for this Court to rule upon the Constitutional issues involved in wiretapping, it is a case of first impression and for that reason alone requires reversal. If the Court adopts, as applicable to telephone wiretapping, any of the Constitutional Arguments urged by the Petitioner—arguments under the First, Fourth, Fifth, Ninth and Fourteenth Amendments—it will be the Court's first occasion for doing so. This Court has never failed to apply its Constitutional

decisions to the case which brought about the determination. To do otherwise would make appeal on novel Constitutional questions pointless and discourage the vindication of basic Constitutional rights. *Stovall* v. *Denno*, 388 U.S. 293, 301.

3.

The Respondent's Absurd Factual View Concerning the Function and Status of Telephonic Communications.

A determination as to whether telephonic communications falls within the protection of the Federal Constitution must, of course, begin with an evaluation of the function and status of such communication in modern society. The Introduction to our argument in our opening brief offers such an evaluation. Examination of the Respondent's Brief reveals a fundamental and startling conflict on this question. Since the Respondent's approach to the Constitutional questions must be geared to his analysis of the function and status of telephonic communications, we are constrained to gather together from the various parts of the 121 page argument section of his brief his comments in this regard.

Commencing with what we consider a main and desperate hope, he states:

> "Such an appraisal *may also* be reinforced by a change in public values which places less emphasis on the importance of telephonic privacy. That value is not necessarily immutable or as lasting in its vitality, as e.g., marital privacy. The telephone is, after all, not sacrosanct. In some circles, a whole mythology has grown up around this rather mundane little device,

investing it with almost quasi-religious significance, but it is no more a proper subject for canonization than other instruments of social life.

"Under the general intent of our constitutional scheme and the provision of the Tenth Amendment, the power of decision regarding this subject rests with the people acting through their legislative representatives. It is not the design of our constitutional scheme that the Fourth, Ninth or Fourteenth Amendments should be employed to remove such important matters of policy from the domain of popular control." (Resp. 62-63)

This latter appeal for local control over the privacy of communications is absurd in light of the national and international nature of the telephone system. Cf. *Weiss* v. *United States*, 308 U.S. 321.

He goes on to drastically minimize the content of telephone communications:

"Respondent contends that the pertinence of First Amendment theory in the realm of telephonic communications is far from self-evident. The telephone is not the natural setting for the exercise of First Amendment freedoms. Since this instrument did not exist when the First and Fourteenth Amendments were adopted, it can hardly be said that the Framers intended that First Amendment principles should prohibit governmental action tending to exercise a restraining effect on telephonic expression.

"The Framers envisioned the mails, the printing press and the face-to-face discussion as the agencies of expressionary freedom and there would seem no good

reason to insist that telephonic communications be favored with the same indulgence in view of the fact that these other avenues of expression are still available. There seems little which cannot be said concerning political, intellectual and sexual subjects in public discourse and the possibility of electronic eavesdropping would hardly be likely to induce a reticence concerning such matters in the present permissive climate of opinion. And even if a regime of wiretapping exercised some restraint on the discussion of intimate, personal matters, such expression is not the type necessary to political and intellectual creativity.

"In many telephone conversations, one or the other of the parties, and often both, is in an office or a public place or at least in a situation in which other persons are present. Therefore a wiretap ban would only mean that there would be a few less witnesses—not no witnesses. The official witness conducting the wiretap interception under a statutory regime could not reveal the substance of the conversation unless testimony regarding it should be introduced in Court, whereas the private persons hearing it through physical proximity would hardly be so constrained.

"Even assuming that a permissive wiretap program of tapping and public divulgence in legal forums might induce caution and a withholding of the fullest conversational exchanges in telephone talks, it is patent that such caution would only operate to inhibit discussion of illegal acts or embarrassing subjects, e.g., sexual talk. It would not inspire timidity as to legitimate business matters (at least where all but official

wiretapping was banned), so economic life would not be restrained.

"Can it justly be said that there is really any great need to preserve the fullest freedom of communication with regard to embarrassing subjects? Such matters, too, may be dealt with in personal conference or written missives. There is really no pressing public need to rely on the telephonic medium for such purposes, and what limited advantage in increased communication is conferred by the telephone in this regard seems hardly so weighty a social benefit as would justify significant restrictions on the effectiveness of law enforcement.

"On any reasonable application of the *ad hoc* balancing test, this interest in idle chitchat must be held to have less weight in the balance than the public interest in effective law enforcement.

"That such small talk should not be given the status of protected speech is suggested by this Court's refusal to extend the protection of the First Amendment to advertising and commercial speech. At the very least it may be said to rank low on the scale of constitutional values.

"It is not vital to the well-being of the republic that there be provided for the dissemination of such talk an additional channel beyond that known to the Framers of the Constitution.

"The impressive technology of telephone communication, which was developed at enormous cost and effort, was not conceived for the purpose of serving as a vehicle for such conversations. The interception of them does not interfere with any activities protected by the justifying rationale of telephonic technology

or by basic social values. Most Americans, if questioned on the subject, would surely say that such conversations should be limited to personal confrontations and should not be conducted over the telephone. In any event, interception of such conversations would not embarrass the participants under a court controlled wiretap regime, since they would not be revealed in Court except in those rare instances in which they were enmeshed inextricably with criminal communications.

"It is perhaps for this reason that few citizens in New York, if any, have any sensation in their daily lives that their privacy is being invaded, and this is true despite the fact that New York's permissive scheme for wiretapping has long been in effect. Even criminals continue to discuss their illegal enterprises over the phone, as they did in this case. The fact is that the overwhelming majority of telephone conversations are so pedestrian and lacking in interest or color, that the participants would hardly be constrained by fear of eavesdropping." Resp. 138-140; see also, Resp. 154, 157.

In light of the diametrically opposite position which the Respondent has offered this Court to rebut the Petitioner's analysis of the function and status of telephone communication, we can do little more than bring the Respondent's view into focus and let it reveal itself for what it is—absurd.

4.

There Is No Merit in Fact or in Law to Respondent's Argument That Katz v. United States, 389 U. S. 347, Should Be Limited to Its Facts and That Fourth Amendment Protections Should Be Circumscribed by a "Contact" Theory.

As we point out under Item 9, *infra,* page 38, the Respondent has engaged in an overabundance of irrelevant, imaginative and absurd speculation concerning the possible results of a determination in the Petitioner's favor. As an introduction to this point, we trust that we will be forgiven some speculation of our own which is more to the point and cuts to the heart of the issue.

Assume that a device is developed which is an extension of presently known photographic and x-ray procedures, so that various types of solid matter can be seen through. Assume further that by manipulation of a fine tune control the powers of the device can be made to penetrate with a high degree of accuracy to whatever depth the operator desires. We thus have a situation where activities behind the walls of a structure can be observed *without contact. But more,* by manipulating the fine tune control the operator will be able to see into the pockets and drawers behind the walls, and will be able, layer by layer, to examine, read and photograph papers and objects contained therein.

In light of present day technology, it is probable that few would contest the likely development of such a device—but whether it be developed or not, it cuts to the heart of the issue concerning the Respondent's "contact" theory of the Fourth Amendment (Resp. 42-56). That theory, in

conjunction with the device described above, would render the Fourth Amendment a nullity. It is inconceivable that this Court would permit such a nullification of purpose.

The explanation of Constitutional doctrine concerning the spoken word being relatively recent, we have used the above illustration to apply electronic developments to the age-old objections of search and seizure. The thrust of the example applies with equal force to the seizure of the spoken word. It is noteworthy that in his fifteen-page advocacy of the "contact" theory, the Respondent offers no rationale for the theory other than that it would permit certain wiretapping.

It would hardly appear necessary to elaborate upon why the Respondent's theory of "contact" is erroneous. This Court has already so held in *Katz* v. *United States*:

> "We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." 389 U. S. 347, ——, 88 S.Ct. 507, 512.

At one point in his argument, the Respondent argues that wiretapping constitutes neither a physical nor an elec-

tronic invasion. His basis for urging this is that "the conversant cannot place himself inside of a telephone line and . . . a wiretap eavesdrops on that line and not on the place where the talker is located. . . ." (Resp. 50.) This is nothing more than a distortion of reality. Aside from the obvious absurdity of this position, this Court's holding "that the Fourth Amendment protects people—and not simply areas—against unreasonable searches and seizures" is a clear answer to his contention. *Katz, supra,* 389 U. S. 347, ——, 88 S.Ct. 507, 512.

The Respondent additionally argues that since wiretapping is controlled by statutory law, privacy will not be sacrificed by a holding which excludes wiretapping from the coverage of the Fourth Amendment. (Resp. 56.) In effect, he is urging that the statute has pre-empted a Constitutional area. No citation is needed for the proposition that a statute may not *diminish* rights which are guaranteed by the Constitution.

The "contact" which the Respondent urges is necessary for the invocation of Fourth Amendment protection was in fact present in the instant case.

The Respondent urges that "the Court need go no further than to hold that the *Katz* rule applies only to electronic eavesdropping which involves some physical contact (whether amounting to a trespass or not) with the structure within which is occurring the conversation which is eavesdropped." (Resp. 43.) He concludes his argument by stating that "most wiretapping does not involve such contact, nor was there such contact in this case (A. 117-120, 141, pp. 18-21, Brief for Petitioner)." Since it was the

Respondent District Attorney, himself, who authorized and supervised the wiretapping herein, he knows full well that the wiretap equipment was installed in the basement of a hotel. The bar in which the telephone was located is a part of the hotel structure and shares telephone facilities with it.

That we are dealing with one and the same structure is clearly revealed by the testimony of Detective Beach, who installed the wiretap equipment:

> "Q. Now, as I understand it, Detective Beach, somehow or other you with Detective Skuzenski, you went to the [187] basement of this building wherein was the phone LW 4-2523?
>
> A. Yes, sir.
>
> Q. How did you get into the basement?
>
> A. Through one of the side entrances.
>
> Q. Did the owner of the building know you had come in or had you contacted him?
>
> A. We contacted somebody in the building, sir. I don't know whether he was the owner or what. I believe it was the man behind the desk." (A. 140)

Thus, under the Respondent's own test, wiretapping in this case came within the protection of the Fourth Amendment.

5.

The Respondent Is Incorrect in Arguing That the Actual Wiretap Procedures Followed Complied With Fourth Amendment Standards.

(a) The Petitioner Did Not Knowingly Expose His Conversation to Public Hearing.

The Respondent urges that the telephone conversations herein did not occur in a "situation of privacy". (Resp. 63-64) He urges that since the Petitioner called to a telephone that was located in a public place (the Headline Bar), "it follows that he must have been aware that his telephone calls to the Headline Bar *could have been overheard* on the extension or partially overheard by patrons standing near the telephone." (Resp. 64) He further urges that "moreover, since the objective conditions did not amount to a situation of privacy, it matters not whether Petitioner relied on an assumption of privacy or whether the assumption was reasonable". (Resp. 64) The Respondent builds his case upon assumption after assumption. The question is not "what could have been" but rather what was.

By a logical extension of his argument, very few searches and seizures would be violative of the Fourth Amendment. Thus, the owner of a home or an office or an automobile knows that his guests, patrons, fellow workers or family "could" rummage his drawers, examine his books, pick up his telephone and listen in on an extension, etc. In any event, there is absolutely no record justification for the assertion that the telephone conversations herein did not occur within a situation of privacy. It is noteworthy that

the fact situation in *Lee* v. *Florida* revealed that Lee was a subscriber to a party-line telephone.

The Respondent's arguments concerning the Petitioner's lack of a situation of privacy is interestingly contrasted with his later argument that notice need not be given upon the execution of a wiretap warrant: "(I)t is obvious that notice is but a means of assuring the utter ineffectuality of the wiretap investigative device, since a person who knows his conversation will be overheard is likely to refrain from incriminating statements and warn other persons using his telephone to do likewise." (Resp. 72)

(b) THE CRITERIA OF THE FOURTH AMENDMENT SHOULD NOT BE RELAXED FOR THE PURPOSE OF ACCOMMODATING WIRETAPPING.

In his Brief at pp. 65-73, the Respondent urges that the Fourth Amendment criteria

> "should not be enforced in their full rigor and the Court should be content with the appropriate degree of compliance which may be exacted without destroying the effectiveness of the wiretap investigative device". (Resp. 65)

This is only another way of saying that the Fourth Amendment should bend to accommodate the inherent Fourth Amendment deficiencies which are to be found in many wiretap situations. He cites *Camara* v. *Municipal Court*, 387 U. S. 523, for this proposition, but the case holds nothing of the sort. There, the question discussed at p. 533 concerned the various circumstances under which a war-

rant need or need not be obtained. We know of no case which holds that every time the police come up with a new investigative technique, the Fourth Amendment will be adapted to legitimatize that technique.

(c) The Lack of Probable Cause

As we pointed out in our opening brief (Pet., 67-70), there was no showing of probable cause made to the issuing magistrate. No firm or continuing connection of the alleged co-conspirators was shown as to the telephone in question. There was absolutely no evidence that they spoke with each other over the telephone in question. The only showing made was that Holtzman, the alleged victim, had spoken to Granello through that telephone among other telephones. Had the authorities wanted to overhear Holtzman's conversations, they had only to tap Holtzman's telephone (as they did). If this telephone conversation with Holtzman constituted probable cause, as the Respondent argues (Resp. 73-75), then the issuing magistrate would have been justified (as he may have, in fact, done) in authorizing a wiretap on all the telephones with which Granello, Conte, Graziano and Luttman came in contact, regardless of the nature of the place in which the telephone was located or the number of potential telephone users. Simply listing those *which are mentioned* in Levy's testimony in support of the application and the home telephones of the persons noted, we have (aside from the telephone in question):

1. Charles French Restaurant—Holtzman called Granello there (A. 28), and was scheduled to call him there on another occasion, met him there and was to do so again.

2. Granello's home—Granello instructed Holtzman to call him there and Holtzman did call him there twice (A. 32-33, 35).

3. & 4. Patrissy's Restaurant—Granello instructed Holtzman to call him there (A. 32, 38).

5. Granello's other home in Greenwood Lake—Granello instructed Holtzman to call him there (A. 35).

6. Conte's home—being a part of the conspiracy, his telephone was as likely a source of the conversations sought as any of the other telephones were. (A. 22 et seq.).

7. Graziano's telephone—same rationale as Conte. (A. 36-37).

8. Luttman's telephone—same rationale as Conte.

If they had placed the above four persons under surveillance and noted where they sometimes made telephone calls, these places too could have been added to the list with no less justification than that which existed for the telephones noted.

It is not enough to show that certain persons are engaged in a criminal enterprise; there must be probable cause to believe that the search will uncover evidence of the alleged crime. That was not here the case.

(d) The Lack of Judicial Supervision

i. *Particularity*

The wiretap order herein was completely devoid of particularity. It ordered that all telephone conversations be intercepted and noted simply "that evidence of crime may be obtained", without specifying the crime concerning which evidence was being sought. (A. 41-42) If such a warrant accords with the requirement of particularity, what type of warrant would not accord with that requirement? What guidance did the warrant give to the implementing police officers other than the telephone number to be tapped? It might as well have said "Go to such and such an apartment building and bring back the contents of every apartment."

It is noteworthy that the Respondent concedes that "by the very nature of the wiretapping process, it may be impossible for a warrant authorizing it to comply fully with each Fourth Amendment warrant criterion, especially that concerning particularity". (Resp. 66) Likewise, "the fact is that a wiretap interception picks up all conversations during the period in which it is conducted regardless of the degree of descriptive particularity in the wiretap order." (Resp. 70) Using his bootstrap reasoning, he concludes:

> "Thus, an insistence on strict particularity in the description of the conversants within the scope of the order would serve no useful, practical purpose. The argument that wiretap eavesdropping must restrict itself to the overhearing of particular conversations is simply another way of urging the untenable thesis that wiretapping is unconstitutional in its very nature and must be suppressed." (Resp. 70)

We submit that if, as *the Respondent* urges, a wiretap order cannot particularize the objective of the search, or if the wiretappers cannot so restrict the search, then wiretapping is indeed unconstitutional. But see *Osborn* v. *United States,* 385 U. S. 323, and *Katz* v. *United States,* 389 U. S. 347, ——, 88 S.Ct. 507, 513, in which this Court found such particularity possible.

In attempting to shore up his argument of particularity, the Respondent argues that "the description provided in this case in the order was supplemented by the oral testimony before the issuing judge of Assistant District Attorney Norman Levy. Under the law of New York, such oral testimony forms part of the wiretap order (*People* v. *McCall,* 17 N. Y. 2d 152), as the Court of Appeals noted in this case." Mr. Levy's testimony takes up 34 typewritten and 21 printed pages (A. 20-40). There has never been any allegation in this case that the wiretappers were armed with copies of this oral testimony, and it is clear that they were not present when this testimony was given (A. 83). How that testimony could have placed any restriction upon the wiretappers is beyond understanding. Had the testimony never been given, and had the order simply been granted upon mere request, the wiretappers would have seized precisely the same conversations which were transmitted over the telephone in question during the period of the surveillance.

ii. *Duration of Search*

The search was authorized for a period of sixty days, with no automatic termination provision and there was statutory authorization for a renewal of an additional sixty days. The Respondent argues that, notwithstanding, the

provisions of the order, the fact is that the conversations which were used in evidence were seized after a period of less than four days of wiretapping. (Resp. 76) Even if an order providing for a four day surveillance would be adequate (which we do not concede), the fact is that the order herein did not so provide. The Respondent has provided no answer consistent with this Court's holding in *Katz* v. *United States* that "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer." 88 S.Ct. 507, 514. Without citation or elaboration, the Respondent states:

> "Also, it is Respondent's contention that *the overheard conversations were not seized when they were overheard but only, if at all, when they were used in Court.* (Resp. 72—emphasis in original.)

This preposterous assertion is devoid of any logic whatever.

iii. *Return*

In arguing that a return *was,* in fact, made, the Respondent follows, word for word, the allegations of his Brief in Opposition to our Petition for Certiorari. His claim is that a return was made to the "petitioner and the trial judge" some two years after the seizures. (Resp. 77-78). In our opening brief, we challenged the validity of the claim that this constituted a proper return (Pet. 77-78). He has made no attempt to respond to that challenge and offers no authority for his novel assertion. He claims that the so-called method of return followed in the present case did not prejudice the Petitioner (Resp. 78). Who is to say

that? Who knows what might have happened to those tapes during the two year period involved? To this day, no one aside from the wiretappers, has had possession or knowledge of all the tapes of seized conversations. To this day, we have no way of knowing whether conversations, other than those used in evidence, could have been used by the defense for purposes of exculpation. The District Attorney used what he thought to be valuable and stored the rest away. Even aside from the factor of actual prejudice, the requirement of real control over the search and seizure process was completely frustrated by this lack of a return. The statute did not provide for a return, the order did not provide for a return and the Court of Appeals of New York has held that "It is true . . . that there was not return on the warrant • • • " (A. 313; 21 N.Y.2d 86, 96; 286 N.Y.S. 2d 801, 809).

iv. *Notice*

The present position of this Court on the question of notice in electronic surveillance cases is concededly unclear. The one such case in which the surveillance was upheld although there was no notice was *Osborn* v. *United States,* 385 U.S. 323. But the situation there was substantially different from that in the wiretapping area. An informer was invited in and he recorded his own conversation with the defendant. The defendant there was on notice that he was speaking to the informer, although not on notice that the conversation was being recorded. Mr. Justice Stewart, in a footnote to this opinion in *Katz* v. *United States,* explains this lack of notice upon the theory, "that officers need not announce their purpose before conducting an otherwise authorized search if such announcement would provoke the

escape of the suspect or the destruction of the critical evidence." 389 U.S. 347, ——, 88 S.Ct. 507, 513, footnote 16. This analysis is somewhat questionable. In the first place, we are not concerned here with an escape situation. As for the second ground, the destruction of evidence, a knotty problem is presented. In our opening brief, at page 61, we noted that "outside the area of eavesdropping, we know of no case which authorized the seizure of something which has not yet come into existence." The Respondent has left unanswered this criticism of wiretapping. Applying Mr. Justice Stewart's rationale to the above comment, there is produced the explanation that the lack of notice is warranted by the desire to prevent the destruction of the critical evidence which has not yet come into existence. This leaves us with a situation twice removed from traditional search and seizure requirements. Have we come that far away from the mere evidence rule? Cf. *Gouled* v. *United States,* 255 U.S. 298, 309, *Warden* v. *Hayden,* 387 U.S. 294.

We submit that the notice requirement is at least one of the areas in which "the fourth and fifth amendments run into each other" when applied to wiretapping. The argument in our main brief that wiretapping violates the Fifth Amendment is applicable here (Pet. 62-63). The statements of this Court in *Schmerber* v. *California,* 384 U.S. 757, 763-764, and *Warden* v. *Hayden,* 387 U.S. 294, 302-303, lend strong support to this theory.

(e) The Quantity of Wiretap Warrants Involved

It is known that at least four separate telephones were tapped in the present case. By a motion filed with this Court on October 7, 1968, we requested that an order issue requiring the Respondent to inform this Court concerning

the number and nature of the electronic surveillance attempts in the present case. We had earlier announced our intention to make this motion in our opening Brief (Pet. 18, 78). As this reply brief is being sent to the printer, no answering papers on the motion have been received from the Respondent and no disposition has been made of the motion by the Court. The Respondent's Brief was served upon us on October 25, 1968, at least 17 days after they received our motion papers, yet he ignores the thrust and content of those papers. He refers only to our announced intention, made in our opening brief, to make such a motion, and our challenge to the four known wiretaps, which forms Point III-D of our opening brief (Pet. 76-79). Our argument, that the broad grant of wiretapping permission in the present case, covering a number of telephones, compounded the unconstitutionality of the search so as to decisively deprive the wiretapping of any semblance of due process, is met only by the answer that the Petitioner has no standing to challenge those "orders on telephones in which he has no proprietary interest and over which he has not conversed." (Resp. 79). That claim is met by us under item 1 *supra* at page 6.

6.

The Retroactivity Problem.

In our discussion under item 2, *supra*, pages 7-15, we discuss the question of retroactivity as it applies to the Section 605 aspect of our case, particularly with reference to the impact of *Fuller* v. *Alaska*, No. 249, This Term. Here we discuss retroactivity as it applies concerning our arguments under the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

Assuming a new rule is announced in the present case, favorable to the Petitioner's arguments, he "must be given (the) benefit" of that rule. *Stovall* v. *Denno*, 388 U.S. 293, 301.

Assuming that a decision is rendered, favorable to the Petitioner's arguments under *Mapp* v. *Ohio*, 367 U.S. 643, then *Linkletter* v. *Walker*, 381 U.S. 618, dictates a reversal since the Petitioner's case is still in the appellate process, or, perhaps more to the point, since this case simply involves a completely prospective application of *Mapp*.

Assuming that a decision is rendered, favorable to the Petitioner's arguments, but neither novel nor under *Mapp*, but rather, pursuant to some prior decision which creates a retroactivity question, then we still maintain that this Court's retroactivity jurisprudence requires a reversal. In attempting to perceive the rationale of this Court's various decisions on retroactivity, we have concluded that it is to leave open, at least to defendant's on direct appeal, an attack upon the actual oppression which the Constitution seeks to prevent. Thus, *Linkletter* v. *Walker*, *supra*, permitted such persons to attack an illicit search and seizure—the fact of prejudice was clear and one could not get any more basic than to show that the search and seizure was unconstitutional; *Tehan* v. *Shott*, 382 U.S. 406, 409, footnote 3, permitted such persons to attack the Fifth Amendment violation occasioned by comment upon the accused's failure to testify—the fact of prejudice was clear and one could not get any more basic than to show that the comment was unconstitutional. On the other hand, *Johnson* v. *New Jersey*, 384 U.S. 719, which set the timetable for the new confession rules, was concerned not with fundamental rules, but rather intermediate rules. What we mean is

that the *basic* Constitutional question involved was that of coerced confessions. The new rules were geared toward minimizing the incidence of coerced confessions. *Johnson* was clear that in denying the application of the new rules to prior cases, it was not denying the opportunity to attack the underlying oppression which the new rules sought to prevent: the actually coerced confession. 384 U.S. 719, 730. Indeed, lack of compliance with the new rules was left available for use as one of the elements of an involuntariness claim. *Ibid. Stovall* v. *Denno,* 388 U.S. 293, which set the timetable for the new lineup rules, presented basically the same situation as *Johnson, supra. Stovall,* too, was concerned not with the vindication of fundamental Constitutional rules, but rather, with the implementation of intermediate rules which were geared toward minimizing the incidence of unfair lineup procedures. *Stovall* was clear that in denying the application of the new rules to prior cases, it was not denying the opportunity to attack the underlying oppression which the new rules sought to prevent: the actually unfair lineup. 388 U.S. 293, 301-302.

The above decisions were all basically concerned with questions of evidence. This Court's determination in *Destefano* v. *Woods,* —— U.S. ——, 88 S.Ct. 2093 involved a qualitatively different problem, the applicability of the Sixth Amendment right to a jury trial. The underlying objective appeared to be that of guaranteeing a fair trial and, as the Court said "to prevent arbitrariness and repression." —— U.S. ——, ——, 88 S.Ct. 2093, 2095. It goes without saying that the alternative approaches provided by *Johnson* and *Stovall, supra,* are available to those who do not qualify under the *Destefano* doctrine. Moreover, in the type of cases to which the jury trial rule would apply,

were it not for the decisional deadline, stenographic minutes of the proceedings are available and the defendant will have had the assistance of counsel in making a proper record—all of this being available for an attack upon actual unfairness.

7.

The Effect of the Recent Change in Federal and New York State Wiretap Laws.

The Respondent argues that the recent change in the Federal wiretap law renders the prohibitions of Section 605 "inoperative" for the future. (Resp. 79-80). We assume that this Court's recent decision in *Fuller* v. *Alaska,* No. 249, This Term, which applies Section 605 to cases yet to be tried, eliminates that argument. Our position, to the effect that Section 605 should still be operative in the Petitioner's case, even in light of *Fuller,* is covered under Item 2, *supra,* pages 7-15.

The Respondent further urges that this Court need not concern itself with Section 813-a of the New York Code of Criminal Procedure—the statute declared unconstitutional on its face in *Berger* v. *New York,* 388 U.S. 41, 44, 55, 64. The fact is that the conversations were seized pursuant to that statute, the New York Court of Appeals examined the seizures pursuant to that statute, and, although now repealed, the statute is very much alive as far as this Petitioner is concerned. It would indeed be a strange sort of due process which would permit the rules to be changed after they had been broken, thus depriving a defendant of the right to challenge the grossly improper procedure to which he has been subjected.

8.

The Applicability of the Ninth Amendment.

The Respondent argues that if our Ninth Amendment argument is accepted, it will bring all wiretap legislation crashing down. As we stated in our opening brief, if the People of our Country want wiretapping, the process of Constitutional amendment is available to them. The incredibly crass intrusion involved in wiretapping would very likely have been considered somewhat beneath barbarism in an earlier age. Can it be doubted that wiretapping intrudes upon the lives of far more good, innocent people than it does upon the lives of criminals? This is not to suggest that the one has any greater rights than the other, but it is certainly a fact of extreme significance as to the propriety of the means employed. We submit that the privacy involved here is an aspect of the freedom which the People reserved to themselves, and only they should give it up—neither legislature nor court should take it away.

The Respondent urges that this Court has avoided such absolute prohibitions (Resp. 93). Of course, it is a matter of perspective. This Court *has* given effect to the Constitutional mandate that coerced confessions are absolutely prohibited, that unreasonable searches and seizures, unfair trials, etc., are likewise prohibited.

9.

The Respondent's Arguments Concerning "Extreme Judicial Activism" and "Constitutional Crisis".

In light of the implications to be found in certain of the Respondent's arguments and which appear to reflect the philosophy of his brief, we are constrained to deal with those arguments.

At page 93 of Respondent's Brief, it is urged that this Court should not rely upon the Ninth Amendment as being a source for the protection of individual privacy. He states that such a determination:

> "... will unleash upon this Court unrelenting pressure to undertake a new career of extreme judicial activism in the service of a totally novel spectrum of private rights limited in its extent only by the substantive imagination and procedural ingenuity of constitutional advocacy."

At page 94, he claims:

> "That such an enhanced role for the judiciary would incite a constitutional crisis as pervasive as that of the 1930's, is perhaps not an unreasonable expectation."

Whether this latter comment be a veiled (or, perhaps, not so veiled) attempt to intimidate this Court, we leave for the Respondent to explain.

The initial question before this Court is whether those aspects of the Constitution which protect the integrity and dignity of the individual and of society apply to the telephonic medium of communication. If they do apply, then

the question is under what circumstances, if at all, may wiretapping be performed. The spectre of what "may", "might", "could" or "possibly will" be the result of such a decision is raised by the Respondent through the use of absurd analogies and projections. The Respondent's brief is replete with imaginative straw men against which he does battle, rather than meet directly the arguments advanced by the Petitioner.

The Respondent urges this Court that the Constitutional imposition of restrictions upon wiretapping:

> "*might* be considered" to eliminate the use in evidence of observations open to public view (Resp. 45); "*may* exercise a constraining effect on the activities of law enforcement officers mindful of the possibility" of civil or criminal liability (Resp. 47); "*may* lead to widespread cynicism in the police establishment concerning the obligation to respect this Court's decisions" (Resp. 47); "*may* encourage a massive outpouring of damage suits and injunctions" (Resp. 47-48); "*may, if* interpreted broadly, prohibit informer evidence obtained by stealth and without cooperation of the suspect" (Resp. 49); "would deal a fatal blow to law enforcement" (Resp. 47); "*could* be used to protect . . . persons conversing briefly in secluded corners in public places or restaurants in low tones audible to electronic surveillance or to an eavesdropper hidden behind a post or curtain" (Resp. 51); "would (result in) extensive pre-trial motions and hearings" (Resp. 52); "*might* result in a breakdown of law enforcement" (Resp. 52); "would only compound" calendar congestion and serious delays in the trial of felony cases and

increase the plight of those financially unable to make bail" (Resp. 52); "lower courts, state and federal, *might* by a bold course of inference, deduce the conceptual consequences of the Court's full-blown statement as protecting . . . any other expression or emanation of (the accused's) personality or person which he intended to be private" (Resp. 53); "*might* impel some state and federal courts to declare e. g. that written evidence of the fruits of crime buried in a forest or secreted on someone else's property could not be obtained by police without a warrant" (Resp. 54); "*might* well result in the abrogation of the traditional principle that the Fourth Amendment regulates only official conduct" (Resp. 54); "Nor may it be assumed with confidence that Courts will not decree such a regime of unreason" (Resp. 55); "the goal which (this Court) regards as marking the limits of the possible *may* simply provide the point of departure for a successor Court, so that by steady progression toward the goal of a general privacy doctrine, constitutional adjudication gradually reduces the vitality of law enforcement" (Resp. 55).

Additionally, such a decision

"*may* produce a fundamental alteration in the balance of social forces . . . (and) a permanently flawed society" (Resp. 56); "would call into question all of the other privacy invading investigative devices employed by law enforcement officers" (Resp. 93); "will be the means of working a fundamental change in the federalist structure of authority ordained by the Framers" (Resp. 97); "*might* be interpreted as saying that all

evidence obtained by non-physical invasion of a situation of privacy must be excluded from evidence in State criminal trials" (Resp. 102); "would authorize the protection of an endless range of interests as varied as those multitudinous occasions of dignity—the infringement of which are the everyday result of government's operation" (Resp. 106); "it follows that every type of privacy invading technique indulged in by the police is violative of a right of privacy" (Resp. 113); "ignore(s) the privacy of those victims of crime which can only be protected by official wiretappings" (Resp. 116); "would constitute an insuperable obstacle to the enforcement of our laws concerning national security and labor union corruption and would seriously impede the control of criminal conspiracies" (R. 135); and "would serve to forbid" "work of undercover agents" (R. 135). (Emphasis added.)

This parade of horribles is drawn from a view of our judicial system as being composed of "extreme judicial activist(s)" (Resp. 93), embarked upon a "regime of unreason" (Resp. 55). In light of the outlandish hypotheticals conjured up by the Respondent, it is, perhaps, with tongue in cheek that he quotes Mr. Justice Frankfurter's comment in *Rochin* v. *California*, 347 U.S. 165, at 174, at page 44 of his brief:

"We are not unmindful that hypothetical situations can be conjured shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions. But the Constitution is intended to preserve practical and substantial rights, not to maintain theories."

To cast the issue in activist and anti-activist terms, is simply to avoid the issue. We submit that often " . . . the self-proclaimed anti-activist goes through much the same process of choice and decision as does the activist, but simply reaches a different result." F. M. Gregory, Jr., in a book review, 44 Notre Dame Lawyer 171 (1968). As Mr. Justice Black has noted, such terminology "has served as a substitute for careful thinking and writing and also as a fallacious short cut to unjustified conclusions . . . " H. L. Black, *A Constitutional Faith*, p. 15 (1968).

Conclusion

For all of the above reasons, as well as those advanced in our opening brief, the judgment of the Court below should be reversed and the prosecution against the Petitioner, Thomas R. Kaiser should be ordered dismissed.

Respectfully submitted,

PETER L. F. SABBATINO
Attorney for the Petitioner,
Thomas R. Kaiser

HENRY J. BOITEL
Of Counsel